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HOUSE BILL 506

**49TH LEGISLATURE - STATE OF NEW MEXICO - FIRST SESSION, 2009**

INTRODUCED BY

W. Ken Martinez

AN ACT

RELATING TO EMPLOYMENT; AMENDING THE WORKERS' COMPENSATION ACT  
AND THE NEW MEXICO OCCUPATIONAL DISEASE DISABLEMENT LAW.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF NEW MEXICO:

Section 1. Section 52-1-54 NMSA 1978 (being Laws 1987,  
Chapter 235, Section 24, as amended) is amended to read:

"52-1-54. FEE RESTRICTIONS--APPOINTMENT OF ATTORNEYS BY  
THE DIRECTOR OR WORKERS' COMPENSATION JUDGE--DISCOVERY COSTS--  
OFFER OF JUDGMENT--PENALTY FOR VIOLATIONS.--

A. It is unlawful for any person to receive or  
agree to receive any fees or payment directly or indirectly in  
connection with any claim for compensation under the Workers'  
Compensation Act except as provided in this section.

B. In all cases where the jurisdiction of the  
workers' compensation administration is invoked to approve a

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1 settlement of a compensation claim under the Workers'  
2 Compensation Act, the director or workers' compensation judge,  
3 unless the claimant is represented by an attorney, may in [~~his~~]  
4 the director's or judge's discretion appoint an attorney to aid  
5 the workers' compensation judge in determining whether the  
6 settlement should be approved, and, in the event of an  
7 appointment, a reasonable fee for the services of the attorney  
8 shall be fixed by the workers' compensation judge, subject to  
9 the limitation of Subsection I of this section.

10 C. In all cases where the jurisdiction of the  
11 workers' compensation administration is invoked to approve a  
12 settlement of a compensation claim under the Workers'  
13 Compensation Act and the claimant is represented by an  
14 attorney, the total amount paid or to be paid by the employer  
15 in settlement of the claim shall be stated in the settlement  
16 papers. The workers' compensation judge shall determine and  
17 fix a reasonable fee for the claimant's attorney, taking into  
18 account any sum previously paid, and the fee fixed by the  
19 workers' compensation judge shall be the limit of the fee  
20 received or to be received by the attorney in connection with  
21 the claim, subject to the limitation of Subsection I of this  
22 section.

23 D. The cost of discovery shall be borne by the  
24 party who requests it. If, however, the claimant requests any  
25 discovery, the employer shall advance the cost of paying for

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1 discovery up to a limit of three thousand dollars (\$3,000). If  
2 the claimant substantially prevails on the claim, as determined  
3 by a workers' compensation judge, any discovery cost advanced  
4 by the employer shall be paid by that employer. If the  
5 claimant does not substantially prevail on the claim, as  
6 determined by a workers' compensation judge, the employer shall  
7 be reimbursed for discovery costs advanced according to a  
8 schedule for reimbursement approved by a workers' compensation  
9 judge.

10 E. In all cases where compensation to which any  
11 person is entitled under the provisions of the Workers'  
12 Compensation Act is refused and the claimant thereafter  
13 collects compensation through proceedings before the workers'  
14 compensation administration or courts in an amount in excess of  
15 the amount offered in writing by an employer five business days  
16 or more prior to the informal hearing before the  
17 administration, the compensation to be paid the attorney for  
18 the claimant shall be fixed by the workers' compensation judge  
19 hearing the claim or the courts upon appeal in the amount the  
20 workers' compensation judge or courts deem reasonable and  
21 proper, subject to the limitation of Subsection I of this  
22 section. In determining and fixing a reasonable fee, the  
23 workers' compensation judge or courts shall take into  
24 consideration:

25 (1) the sum, if any, offered by the employer:

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1 (a) before the worker's attorney was  
2 employed;

3 (b) after the attorney's employment but  
4 before proceedings were commenced; and

5 (c) in writing five business days or  
6 more prior to the informal hearing;

7 (2) the present value of the award made in the  
8 worker's favor; and

9 (3) any failure of a party to participate in a  
10 good-faith manner in informal claim resolution methods adopted  
11 by the director.

12 F. After a recommended resolution has been issued  
13 and rejected, but more than ten days before a trial begins, the  
14 employer or claimant may serve upon the opposing party an offer  
15 to allow a compensation order to be taken against ~~him~~ the  
16 employer or claimant for the money or property or to the effect  
17 specified in ~~his~~ the offer, with costs then accrued, subject  
18 to the following:

19 (1) if, within ten days after the service of  
20 the offer, the opposing party serves written notice that the  
21 offer is accepted, either party may then file the offer and  
22 notice of acceptance together with proof of service thereof,  
23 and thereupon that compensation order may be entered as the  
24 workers' compensation judge may direct. An offer not accepted  
25 shall be deemed withdrawn, and evidence thereof is not

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1 admissible except in a proceeding to determine costs. If the  
2 compensation order finally obtained by the party is not more  
3 favorable than the offer, that party shall pay the costs  
4 incurred by the opposing party after the making of the offer.  
5 The fact that an offer has been made but not accepted does not  
6 preclude a subsequent offer;

7 (2) when the liability of one party to another  
8 has been determined by a compensation order, but the amount or  
9 extent of the liability remains to be determined by further  
10 proceedings, the party adjudged liable may make an offer, which  
11 shall have the same effect as an offer made before trial if it  
12 is served within a reasonable time not less than ten days prior  
13 to the commencement of hearings to determine the amount or  
14 extent of liability;

15 (3) if the employer's offer was greater than  
16 the amount awarded by the compensation order, the employer  
17 shall not be liable for ~~[his]~~ the employer's fifty percent  
18 share of the attorney fees to be paid the worker's attorney and  
19 the worker shall pay one hundred percent of the attorney fees  
20 due to the worker's attorney; and

21 (4) if the worker's offer was less than the  
22 amount awarded by the compensation order, the employer shall  
23 pay one hundred percent of the attorney fees to be paid the  
24 worker's attorney, and the worker shall be relieved from any  
25 responsibility for paying any portion of the worker's attorney

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1 fees.

2 G. In all actions arising under the provisions of  
3 Section 52-1-56 NMSA 1978 where the jurisdiction of the  
4 workers' compensation administration is invoked to determine  
5 the question whether the claimant's disability has increased or  
6 diminished and the claimant is represented by an attorney, the  
7 workers' compensation judge or courts upon appeal shall  
8 determine and fix a reasonable fee for the services of the  
9 claimant's attorney only if the claimant is successful in  
10 establishing that ~~[his]~~ the claimant's disability has increased  
11 or if the employer is unsuccessful in establishing that the  
12 claimant's disability has diminished. The fee when fixed by  
13 the workers' compensation judge or courts upon appeal shall be  
14 the limit of the fee received or to be received by the attorney  
15 for services in the action, subject to the limitation of  
16 Subsection I of this section.

17 H. In determining reasonable attorney fees for a  
18 claimant, the workers' compensation judge shall consider only  
19 those benefits to the worker that the attorney is responsible  
20 for securing. The value of future medical benefits ~~[shall not]~~  
21 may be considered in determining attorney fees.

22 I. Attorney fees, including, but not limited to,  
23 the costs of paralegal services, legal clerk services and any  
24 other related legal services costs on behalf of a claimant or  
25 an employer for a single accidental injury claim ~~[including]~~

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1 during representation before the workers' compensation  
2 administration [~~and the courts on appeal~~] shall not exceed  
3 [~~sixteen thousand five hundred dollars (\$16,500). This~~  
4 ~~limitation applies] twenty thousand dollars (\$20,000) subject~~  
5 to the following provisions and exceptions:

6 (1) in the event that the cap of twenty  
7 thousand dollars (\$20,000) has been exhausted and additional  
8 legal services are necessary to maintain adequate  
9 representation in subsequent proceedings before the workers'  
10 compensation administration, a workers' compensation judge may  
11 award an additional fee of up to five thousand dollars (\$5,000)  
12 for each subsequent proceeding; and

13 (2) for legal services upon appeal to the  
14 court of appeals or the supreme court, a workers' compensation  
15 judge may award additional attorney fees of up to ten thousand  
16 dollars (\$10,000) for a successful appeal.

17 These limitations apply whether the worker, claimant or  
18 employer has one or more attorneys [~~representing him~~] and  
19 [~~applies~~] apply as a cumulative limitation on compensation for  
20 all legal services rendered in all proceedings and other  
21 matters directly related to a single accidental injury to a  
22 worker or claimant. [~~The workers' compensation judge may~~  
23 exceed the maximum amount stated in this subsection in awarding  
24 a reasonable attorney fee if he finds that a claimant, an  
25 insurer or an employer acted in bad faith with regard to

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1 ~~handling the injured worker's claim and the injured worker or~~  
2 ~~employer has suffered economic loss as a result. However, in~~  
3 ~~no case shall this additional amount exceed two thousand five~~  
4 ~~hundred dollars (\$2,500). As used in this subsection, "bad~~  
5 ~~faith" means conduct by the claimant, insurer or employer in~~  
6 ~~the handling of a claim that amounts to fraud, malice,~~  
7 ~~oppression or willful, wanton or reckless disregard of the~~  
8 ~~rights of the worker or employer. Any determination of bad~~  
9 ~~faith shall be made by the workers' compensation judge through~~  
10 ~~a separate fact-finding proceeding.]~~

11 J. Except as provided [~~for~~] in Paragraphs (3) and  
12 (4) of Subsection F of this section, the payment of a  
13 claimant's attorney fees determined under this section shall be  
14 shared equally by the worker and the employer.

15 K. It is unlawful for any person except a licensed  
16 attorney to receive or agree to receive any fee or payment for  
17 legal services in connection with any claim for compensation  
18 under the Workers' Compensation Act.

19 L. Nothing in this section applies to agents,  
20 excluding attorneys, representing employers, insurance carriers  
21 or the subsequent injury fund in any matter arising from a  
22 claim under the Workers' Compensation Act.

23 M. No attorney fees shall be paid until the claim  
24 has been settled or adjudged.

25 N. Every person violating the provisions of this

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1 section is guilty of a misdemeanor and upon conviction shall be  
2 fined not less than fifty dollars (\$50.00) or more than five  
3 hundred dollars (\$500), to which may be added imprisonment in  
4 the county jail for a term not exceeding ninety days.

5 O. Nothing in this section shall restrict a  
6 claimant from being represented before the workers'  
7 compensation administration by a nonattorney as long as that  
8 nonattorney receives no compensation for that representation  
9 from the claimant."

10 Section 2. Section 52-3-47 NMSA 1978 (being Laws 1987,  
11 Chapter 235, Section 41, as amended) is amended to read:

12 "52-3-47. FEE RESTRICTIONS--APPOINTMENT OF ATTORNEYS BY  
13 THE DIRECTOR OR WORKERS' COMPENSATION JUDGE--DISCOVERY COSTS--  
14 OFFER OF JUDGMENT--PENALTY FOR VIOLATIONS.--

15 A. It is unlawful for any person to receive or  
16 agree to receive any fees or payment directly or indirectly in  
17 connection with any claim for compensation under the New Mexico  
18 Occupational Disease Disablement Law except as provided in this  
19 section.

20 B. In all cases where the jurisdiction of the  
21 workers' compensation administration is invoked to approve a  
22 settlement of a compensation claim under the New Mexico  
23 Occupational Disease Disablement Law, the director or workers'  
24 compensation judge, unless the claimant is represented by an  
25 attorney, may in ~~his~~ the director's or judge's discretion

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1 appoint an attorney to aid the workers' compensation judge in  
2 determining whether the settlement should be approved. In the  
3 event of such an appointment, a reasonable fee for the services  
4 of the attorney shall be fixed by the workers' compensation  
5 judge, subject to the limitation of Subsection I of this  
6 section.

7 C. In all cases where the jurisdiction of the  
8 workers' compensation administration is invoked to approve a  
9 settlement of a compensation claim under the New Mexico  
10 Occupational Disease Disablement Law and the claimant is  
11 represented by an attorney, the total amount paid or to be paid  
12 by the employer in settlement of the claim shall be stated in  
13 the settlement papers, and the workers' compensation judge  
14 shall determine and fix a reasonable fee for the claimant's  
15 attorney, taking into account any sum previously paid. The fee  
16 fixed by the workers' compensation judge shall be the limit of  
17 the fee received or to be received by the attorney in  
18 connection with the claim, subject to the limitation of  
19 Subsection I of this section.

20 D. The cost of discovery shall be borne by the  
21 party who requests it. If, however, the claimant requests any  
22 discovery, the employer shall advance the cost of paying for  
23 discovery up to a limit of [~~one thousand dollars (\$1,000)~~]  
24 three thousand dollars (\$3,000). If the claimant substantially  
25 prevails on the claim, as determined by a workers' compensation

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1 judge, any discovery cost advanced by the employer shall be  
2 paid by that employer. If the claimant does not substantially  
3 prevail on the claim, as determined by a workers' compensation  
4 judge, the employer shall be reimbursed for discovery costs  
5 advanced according to a schedule for reimbursement approved by  
6 a workers' compensation judge.

7 E. In all cases where compensation to which any  
8 person is entitled under the provisions of the New Mexico  
9 Occupational Disease Disablement Law is refused and the  
10 claimant thereafter collects compensation through proceedings  
11 before the workers' compensation administration or courts in an  
12 amount in excess of the amount offered in writing by an  
13 employer five business days or more prior to the informal  
14 hearing before the administration, [~~then~~] the compensation to  
15 be paid the attorney for the claimant shall be fixed by the  
16 workers' compensation judge hearing the claim or the courts  
17 upon appeal in the amount the workers' compensation judge or  
18 courts deem reasonable and proper, subject to the limitation of  
19 Subsection I of this section. In determining and fixing a  
20 reasonable fee, the workers' compensation judge or courts shall  
21 take into consideration:

- 22 (1) the sum, if any, offered by the employer:  
23 (a) before the employee's attorney was  
24 employed;  
25 (b) after the attorney's employment but

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1 before proceedings were commenced; and

2 (c) in writing five business days or  
3 more prior to the informal hearing;

4 (2) the present value of the award made in the  
5 employee's favor; and

6 (3) the failure of a party to participate in a  
7 good-faith manner in informal claim resolution methods adopted  
8 by the director.

9 F. After a recommended resolution has been issued  
10 and rejected, but more than ten days before a trial begins, the  
11 employer or claimant may serve upon the opposing party an offer  
12 to allow a compensation order to be taken against ~~[him]~~ the  
13 employer or claimant for the money or property or to the effect  
14 specified in ~~[his]~~ the offer, with costs then accrued, subject  
15 to the following:

16 (1) if, within ten days after the service of  
17 the offer, the opposing party serves written notice that the  
18 offer is accepted, either party may then file the offer and  
19 notice of acceptance together with proof of service thereof,  
20 and thereupon that compensation order may be entered as the  
21 workers' compensation judge may direct. An offer not accepted  
22 shall be deemed withdrawn, and evidence thereof is not  
23 admissible except in a proceeding to determine costs. If the  
24 compensation order finally obtained by the party is not more  
25 favorable than the offer, that party ~~[must]~~ shall pay the costs

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1 incurred by the opposing party after the making of the offer.  
2 The fact that an offer has been made but not accepted does not  
3 preclude a subsequent offer;

4 (2) when the liability of one party to another  
5 has been determined by a compensation order, but the amount or  
6 extent of the liability remains to be determined by further  
7 proceedings, the party adjudged liable may make an offer, which  
8 shall have the same effect as an offer made before trial if it  
9 is served within a reasonable time not less than ten days prior  
10 to the commencement of hearings to determine the amount or  
11 extent of liability;

12 (3) if the employer's offer was greater than  
13 the amount awarded by the compensation order, the employer  
14 shall not be liable for [~~his~~] the employer's fifty-percent  
15 share of the [~~attorneys'~~] attorney fees to be paid the worker's  
16 attorney, and the worker shall pay one hundred percent of the  
17 [~~attorneys'~~] attorney fees due to the worker's attorney; and

18 (4) if the worker's offer was less than the  
19 amount awarded by the compensation order, the employer shall  
20 pay one hundred percent of the [~~attorneys'~~] attorney fees to be  
21 paid the worker's attorney, and the worker shall be relieved  
22 from any responsibility for paying any portion of the worker's  
23 attorney fees.

24 G. In all actions arising under the provisions of  
25 Section 52-3-35 NMSA 1978, where the jurisdiction of the

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1 workers' compensation administration is invoked to determine  
2 the question of whether the claimant's disablement has  
3 terminated and the claimant is represented by an attorney, the  
4 workers' compensation judge or courts upon appeal shall  
5 determine and fix a reasonable fee for the services of the  
6 claimant's attorney only if the employer is unsuccessful in  
7 establishing that the claimant's disablement has terminated.  
8 The fee when fixed by the workers' compensation judge or courts  
9 upon appeal shall be taxed as part of the costs against the  
10 employer and shall be the limit of the fee received or to be  
11 received by the attorney for services in the action, subject to  
12 the limitation of Subsection I of this section.

13 H. In determining reasonable [~~attorneys'~~] attorney  
14 fees for a claimant, the workers' compensation judge shall  
15 consider only those benefits to the employee that the attorney  
16 is responsible for securing. The value of future medical  
17 benefits shall [~~not~~] be considered in determining [~~attorneys'~~]  
18 attorney fees.

19 I. [~~Attorneys'~~] Attorney fees, including, but not  
20 limited to, the costs of paralegal services, legal clerk  
21 services and any other related legal services costs on behalf  
22 of a worker or claimant or an employer or insurer for a single  
23 disablement claim, including representation before the workers'  
24 compensation administration and the courts on appeal, shall not  
25 exceed [~~twelve thousand five hundred dollars (\$12,500)~~]. This

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1 ~~limitation applies~~ twenty-seven thousand five hundred dollars  
2 (\$27,500). In the event that the twenty-seven-thousand-five  
3 hundred-dollar (\$27,500) cap has been awarded and additional  
4 legal services are necessary to maintain adequate  
5 representation in subsequent proceedings before the workers'  
6 compensation administration, a workers' compensation judge may  
7 award an additional fee of up to two thousand five hundred  
8 dollars (\$2,500) for each subsequent proceeding.

9 These limits apply whether the worker, claimant or  
10 employer has one or more attorneys [~~representing him~~] and  
11 [~~applies~~] apply as a cumulative limitation on compensation for  
12 all legal services rendered in all proceedings and other  
13 matters directly related to a single occupational disease of a  
14 claimant. [~~The workers' compensation judge may exceed the~~  
15 ~~maximum amount stated in this subsection in awarding a~~  
16 ~~reasonable attorneys' fee if he finds that a claimant, an~~  
17 ~~insurer or an employer acted in bad faith with regard to~~  
18 ~~handling the disabled employee's claims and the employer or~~  
19 ~~disabled employee has suffered economic loss as a result~~  
20 ~~thereof. However, in no case shall this additional amount~~  
21 ~~exceed two thousand five hundred dollars (\$2,500). As used in~~  
22 ~~this subsection, "bad faith" means conduct by the claimant,~~  
23 ~~insurer or employer in the handling of a claim that amounts to~~  
24 ~~fraud, malice, oppression or willful, wanton or reckless~~  
25 ~~disregard of the rights of the employee or employer. Any~~

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1 ~~determination of bad faith shall be made by the workers'~~  
2 ~~compensation judge through a separate fact-finding proceeding.]~~

3 J. Except as provided [~~for~~] in Paragraphs (3) and  
4 (4) of Subsection F of this section, the payment of a  
5 claimant's [~~attorneys'~~] attorney fees determined under this  
6 section shall be shared equally by the employee and the  
7 employer.

8 K. It is unlawful for any person except a licensed  
9 attorney to receive or agree to receive any fee or payment for  
10 legal services in connection with any claim for compensation  
11 under the New Mexico Occupational Disease Disablement Law.

12 L. Nothing in this section applies to agents,  
13 excluding attorneys, representing employers, insurance carriers  
14 or the subsequent injury fund in any matter arising from a  
15 claim under the New Mexico Occupational Disease Disablement  
16 Law.

17 M. No [~~attorneys'~~] attorney fees shall be paid  
18 until the claim has been settled or adjudged.

19 N. Every person violating the provisions of this  
20 section [~~shall be~~] is guilty of a misdemeanor and upon  
21 conviction shall be fined not less than fifty dollars (\$50.00)  
22 or more than five hundred dollars (\$500), to which may be added  
23 imprisonment in the county jail for a term not exceeding ninety  
24 days.

25 O. Nothing in this section shall restrict a

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1 claimant from being represented before the workers'  
2 compensation administration by a nonattorney as long as that  
3 nonattorney receives no compensation for representation from  
4 the claimant."

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